

NTSB Order No. EA-3703

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of October, 1992

Respondent .

Docket SE-10539

Both the Administrator and the respondent have appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, rendered at the conclusion of an evidentiary hearing on May 21, 1990.¹ By that decision, the law judge, in part, affirmed an order of the Administrator charging respondent with a

Both parties filed appeal briefs; however, neither party filed a reply brief.

violation of section 91.88(c) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91), but dismissed the charge of a section 91.9 violation and reduced the period of suspension of respondent's pilot certificate from 30 to 15 days, upon the condition that respondent visit an Air Traffic Control (ATC) facility and submit a written summary to the law judge of what he learned.²

Respondent, appearing pro se, admitted to the basic facts, as set forth in the complaint:

- "2. On or about June 23, 1988, you were the pilot-in-command of a Mooney M20K aircraft, registration no. N4SR, in the area of the Syracuse, Hancock International Airport, Syracuse, New York.
3. During the above-described flight, you entered the Syracuse Airport radar service area [ARSA] without establishing two-way communication with Air Traffic Control (ATC)."

At the hearing, respondent conceded that he violated section 91.88(c). Nonetheless, he claims that he did not act carelessly, and maintains that the law judge erred by imposing any suspension. The Administrator asserts that the law judge

²The pertinent regulations read at the time of the incident, in relevant part:

"§ 91.88 Airport radar service areas.

* * * *

(c) Arrivals and Overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering that area and is thereafter maintained with ATC while within that area."

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

improperly dismissed the 91.9 charge and reduced the suspension, and that he exceeded his authority by imposing a condition on the sanction that was not requested by the Administrator.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety.

We turn first to respondent's appeal. Although he admitted that he entered the airport radar service area (ARSA) without establishing two-way radio communication, and that the incident occurred, in his words, because he "neglected to push the button to engage the RNAV [Area Navigation] feature" (Tr. at 22) on the aircraft, respondent nevertheless asserts that the imposition of any sanction for his actions is "unjustified, unwarranted and illegal." Respondent's position, however, is insupportable. An entry into controlled airspace, in violation of section 91.88(c), is a serious matter, contrary to what respondent would have us believe. The fact that a mid-air collision did not occur is fortunate, but it does not negate the potentially dangerous situation created by respondent's inattention. We are therefore constrained to deny respondent's appeal.³

Regarding the Administrator's appeal, we find that the law judge presented inadequate justification for his dismissal of the 91.9 charge. He neither found that respondent's actions were not

³Respondent makes several other claims which are irrelevant to this proceeding and will not be addressed.

careless, nor expressly stated that the Administrator failed to prove the section 91.9 charge by a preponderance of the substantial, reliable, and probative evidence.

Respondent argued that there was no other aircraft in the vicinity when the incident occurred and if there had been, he would have seen it because visibility was quite good that day. He also asserted that even if the possibility of a potential conflict arose, the controller would be aware of his location from his transponder signal and could divert the other aircraft.⁴

The air traffic controller on duty at the Syracuse ATC facility testified that she tracked respondent's aircraft while it was inside the ARSA and advised the local controller to halt departures from Syracuse, a very busy airport, as a precaution because respondent would have interfered with departing aircraft.

Respondent acknowledged that he made a mistake, but argues that he took steps to correct his error as soon as he discovered it and thereby forestalled any potential danger.⁵

Simply because respondent erred unintentionally does not mean he did not act carelessly. Even if the incident was isolated and inadvertent, the fact remains that respondent

⁴Respondent testified, "[h]ad I been in a position to interfere with any IFR traffic, which I wasn't, they could have been easily and safely routed around me." (Tr. at 24.) This statement is a gross oversimplification of the situation. It is not so easy to safely redirect other traffic around an aircraft that has not established radio communication with ATC because the controller would not know beforehand what course the aircraft will follow once in the ARSA.

⁵Yet, he did not make any attempt to contact ATC.

created a potentially dangerous situation by entering an ARSA without establishing two-way radio contact. See Administrator v. Demar, 5 NTSB 1412, 1417 (1986) (unauthorized entry into terminal control area supported a 91.9 charge, as "any entry into controlled airspace without a clearance to do so carries with it an unacceptable potential for hazard"). Thus, we conclude that the Administrator did, in fact, prove by a preponderance respondent's careless conduct and, consequently, we find the section 91.9 violation should be upheld.

The Administrator has also appealed the law judge's sua sponte imposition of a requirement for respondent to tour an ATC facility as a condition of the law judge's dismissal of the 91.9 charge and reduction of the suspension period. We agree that it was improper for the law judge to assess an additional penalty wholly independent from the sanction sought by the Administrator. Accord Administrator v. Wolfe, 4 NTSB 214, 215 (1982). Thus, we reverse the tour and report requirement.

With regard to sanction, respondent argues that his reliance on his airman certificate to earn a living should work to lessen the severity of the penalty imposed. As we have stated in countless cases, this is not a factor we will consider in mitigation of an otherwise appropriate sanction.⁶ A 30-day

⁶We discussed this issue in Administrator v. Witham, NTSB Order No. EA-3282 (1991), as follows: "While the Administrator considers occupational use of an airman certificate as a factor in assessing a sanction, Board precedent establishes that it 'does not justify further reduction in an otherwise reasonable ... suspension.'" Id. at 8, quoting Administrator v. Tuomela, 4 NTSB 1422, 1424 (1984).

suspension period is consistent with precedent.⁷ Since the law judge did not identify any clear and compelling reasons to alter the sanction imposed, we will grant the Administrator's appeal.⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order of suspension, and the initial decision, to the extent it affirmed the 91.88(c) violation, are affirmed; and
3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.⁹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

⁷See, e.g., Administrator v. Hoskins, NTSB Order No. EA-3422 (1991) (91.88(c) violation, 30-day suspension); Administrator v. Wachsnier, NTSB Order No. EA-3153 (1990) (91.88(c) violation, 30-day suspension).

⁸The law judge must offer clear and compelling reasons before reducing the sanction. See Administrator v. Muzquiz, 2 NTSB 1474 (1975).

⁹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).